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**Before the
FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

In the Matter of)
)
Rulemaking to Amend Parts 1, 2, 21, and 25)
of the Commission's Rules to Redesignate)
the 27.5-29.5 GHz Frequency Band, to)
Reallocate the 29.5-30.0 GHz Frequency)
Band, to Establish Rules and Policies for)
Local Multipoint Distribution Service and)
for Fixed Satellite Services)
)
and)
)
Suite 12 Group Petition for Pioneer's)
Preference)

CC Docket No. 92-297

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To: The Commission

**COMMENTS OF
PANAMSAT CORPORATION**

PanAmSat Corporation ("PanAmSat") submits these comments in response to the Third Notice of Proposed Rulemaking ("Notice") in the above-referenced proceeding. In April 1995, PanAmSat filed an amendment to its application to construct, launch, and operate a new hybrid geostationary fixed-satellite, PAS-9, as part of its separate satellite system. In its amendment, PanAmSat requested authority to use the Ka-band, 27.5-30.0 GHz, for satellite uplinks. Other geostationary fixed satellite ("GSO/FSS") service providers have also applied to use Ka-band frequencies, as have would-be LMDS operators, nongeostationary fixed satellite systems ("NGSO/FSS"), and mobile satellite systems ("MSS").

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In the Notice, the Commission proposed to allocate the Ka-band among these competing services. Under the Commission's band plan, GSO/FSS providers such as PanAmSat will have access to, and use of, 1000 MHz of spectrum in the Ka-band (28.35-28.60 GHz and 29.25-30.00 GHz) on a primary or co-primary basis.¹ The Notice also proposed the use of competitive bidding procedures to license satellites in this band.² For the reasons discussed below, PanAmSat opposes in part the first of these proposals, and opposes the second proposal.

I. DISCUSSION

A. **The Entire Ka-Band Should Be Allocated To Satellite Services In Order To Promote The Development Of The National And Global Information Infrastructure.**

The services that each of the satellite operators have proposed to provide in the Ka-band will be critical components of the NII and GII. With adequate spectrum at 28 GHz, satellites will make available to the world's consumers enhanced wide-area mobile communications, advanced voice and data services, and state-of-the art digital video programming. To fully realize the potential of these broadband communications services, however, satellite operators will require most or all of the Ka-band. Many of these services are in the early stages of development and it is therefore impossible to predict future spectrum requirements precisely.

Nonetheless, it is clear that expected advances in technology and/or anticipated market expansion will make the allocation for satellite services proposed in the Notice inadequate. Therefore, although LMDS systems may someday prove to be a valuable source of competition to existing local exchange carriers or cable operators,

¹ Notice ¶ 45.

² See id. ¶ 128.

the need to develop new and innovative telecommunications services should motivate the Commission to allocate the entire Ka-band for satellite services.

B. The Use Of Competitive Bidding To License GSO/FSS Operators In The Ka-Band Could Be Devastating To The Long-Term Vitality Of The International Satellite Industry.

In the Notice, the Commission has proposed to use competitive bidding procedures to choose among mutually exclusive applications of GSO/FSS satellite operators to provide domestic service in the Ka-band. This proposal should be rejected both for legal and policy reasons.

1. The Statutory Preconditions for Auctions Have Not Been Met.

Under Section 309(j)(1) of the Communications Act, the Commission may use competitive bidding only if mutual exclusivity exists among applications that have been accepted for filing.³ As the Commission recognized in the Notice, it is "premature to determine whether mutual exclusivity will occur" for GSO/FSS systems.⁴ Based on the number of applications so far accepted for filing, it appears that the statutory precondition of mutual exclusivity has not been met. In addition, the Commission has never in the thirty-year history of satellite services had to resolve mutually exclusive satellite applications. In these circumstances, and since the Commission will know for a fact whether mutual exclusivity exists, at least for this processing round, by September 28, 1995, the Commission should not "presume that the prerequisites for competitive bidding will exist."⁵

³ 47 U.S.C. § 309(j)(1); Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Second Report and Order ("Second R&O"), 9 FCC Rcd 2348, 2350 (1994).

⁴ Notice ¶ 136.

⁵ See Second R&O, 9 FCC Rcd at 2351-52.

Moreover, the Commission is obligated to take reasonable measures to "avoid mutual exclusivity in application and licensing proceedings."⁶ In the past, the Commission has employed a number of devices to avoid mutual exclusivity, including flexible licensing and orbital assignment policies, reduced orbital spacing, and negotiation.⁷ Similar efforts should be made to avoid mutual exclusivity of GSO/FSS applications in the Ka-band.

The Communications Act also limits the Commission's auction authority to those situations in which the principal use of the spectrum is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals.⁸ When spectrum will be used both for subscriber-based services and for nonsubscriber-based services, the Commission has concluded that auctions are permissible only if a majority of the use of the spectrum will be for service to subscribers.⁹

In the Notice, the Commission tentatively concluded that GSO/FSS applicants will use the Ka-band principally to provide subscriber-based services.¹⁰ This conclusion is wholly speculative at this time. The Commission's proposed allocation will open up a new frequency band for satellite service. There is, at this

⁶ 47 U.S.C. § 309(j)(6)(E); see also Letter from the Hon. John D. Dingell, U.S. Congress, to the Hon. James H. Quello, Commissioner, FCC (Nov. 15, 1993) ("To underscore that auctions are not a substitute for reasoned decision-making, the new statute provides ... that the Commission is not to abandon its traditional methods of avoiding mutual exclusivity."). Indeed, by limiting GSO/FSS systems to 1000 MHz in the Ka-band, it may be more difficult for the Commission to satisfy its statutory obligation to avoid mutual exclusivity. See Section A, supra.

⁷ See, e.g., GTE Satellite Corp., 93 F.C.C.2d 832, 839 (1983); Filing of Applications for New Space Stations in the Domestic Fixed-Satellite Service, 93 F.C.C.2d 1260, 1261 & n.7 (1983).

⁸ 47 U.S.C. § 309(j)(2); Second R&O, 9 FCC Rcd at 2352.

⁹ Second R&O, 9 FCC Rcd at 2354.

¹⁰ Notice ¶ 131.

early stage, no way for PanAmSat or other GSO/FSS providers to predict with a reasonable degree of certainty the services that they will provide using these frequencies. There is, therefore, simply no basis to conclude that GSO/FSS satellites will be used principally to provide subscriber-based services.

2. The Use Of Competitive Bidding Procedures To Award Licenses May Jeopardize The Commercial Feasibility Of GSO/FSS Systems.

Even if the legal prerequisites for auctions had been met, and they have not, the proposal to use competitive bidding procedures to award licenses in this service should be rejected on policy grounds.

To begin with, the use of auctions to award GSO/FSS licenses will add an additional layer of uncertainty to the satellite authorization process. As the Commission has noted, it is often extremely difficult to arrange financing for space station systems.¹¹ The additional uncertainty created by an auctioning process will further inhibit investment in satellite systems and reduce access to capital markets for new satellite systems, particularly small business and minority ventures. Thus, the use of competitive bidding in this service will directly thwart one of the fundamental goals of Congress in providing the Commission with auction authority — the promotion of economic opportunity through the dissemination of licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women.¹²

Second, there is a substantial risk that the implementation of competitive bidding procedures in the United States will lead other countries to similarly

¹¹ See Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 9 FCC Rcd 5936, 5949 (1994).

¹² See 47 U.S.C. § 309(j)(3).

impose licensing fees on satellite operators, whether through competitive bidding or otherwise. By their nature, satellite services do not conform to national boundaries. In this respect they are unlike the local, regional, and national services the FCC has earmarked for auctioning to date. Satellites potentially provide communications links between and among every country of the world.

As Commissioner Chong has noted, the telecommunications authorities in many other countries are closely monitoring the FCC's auctions, presumably with an eye toward establishing similar procedures.¹³ If the Commission were to begin to require satellite operators to buy the right to provide service in the United States, other countries will doubtlessly follow suit and require operators to pay for the right to provide service in those countries, whether or not mutual exclusivity exists. Chairman Hundt recently explained that U.S. satellite licensing auctions could "trigger a process in which a price is paid here and the next country says, 'I'm the next link in the chain, we'll do our auction, except ours is rigged by the government in our way.' It translates to, 'just pay us more than you did the United States.'"¹⁴

Such a chain reaction of licensing auctions will have a profoundly deleterious impact on the commercial feasibility of satellite systems. As the Commission has recognized in the past, any increase in the cost and/or uncertainty of international authorizations will significantly hinder satellite operators in their efforts to obtain

¹³ See Written Statement of the Hon. Rachele B. Chong, Commissioner, FCC, before the House Budget Committee Hearing on Competitive Bidding Procedures (Sept. 29, 1994) ("It is interesting to note that the topic you are discussing in Washington D.C. this morning -- competitive bidding -- is also a topic of discussion here at the ITU conference in Japan. One of the top three questions I have been asked by the Ministers and Deputy Ministers of Telecommunications with whom I have been meeting involves the success of our new auction process of licensing.... It is clear from these questions that the United States is perceived as a leader in this area, and that other countries are watching our progress closely.")

¹⁴ Chairman Acknowledges International Auction Threat, Mobile Satellite News, Vol. 7, No. 18 (Sept. 7, 1995) at 1.

financing. Indeed, the Commission adopted its two-stage licensing process for separate systems precisely because the now all-but-abandoned Intelsat consultation process made it difficult, if not impossible, for separate system operators to secure financial backing prior to obtaining the necessary international authorization.¹⁵ The introduction of competitive bidding for satellite authorizations in foreign countries will have a similar effect. If the purchase of a license at auction in the U.S. is but the first step in a series of auctions or licensing fee proceedings, each with its own costs and uncertainties, banks and financial institutions will be reluctant to provide the financial backing necessary to construct, launch and operate a satellite system.

Of course, even if an operator could be assured of procuring the necessary authorizations, the cost of doing business as a satellite operator is likely to become prohibitively expensive, particularly for new entrants and small or entrepreneurial companies. This would not only inhibit the introduction of new systems, but it would also threaten the continued operation of currently deployed systems.

Commissioner Quello commented on this danger in a letter to Senator Gorton when Congress was considering the Commission's use of spectrum auctions. In his letter, Commissioner Quello urged Congress:

to be mindful of the potential ramifications on international telecommunications service providers who utilize spectrum in other countries as well as in the United States. For example, requiring use of competitive bidding for ... satellite system licenses in this country might subject those licensees to exorbitant payment requirements for access to spectrum in other countries. I am particularly concerned that some foreign

¹⁵ Establishment of Satellite Systems Providing International Communications, 101 F.C.C.2d 1046, 1164 (1985) ("applicant is unlikely to receive from any banking or financial institution irrevocable financial commitments until the [Intelsat] consultation process is completed").

governments ... could use our competitive bidding requirement as a justification for retaliatory measures.¹⁶

If foreign satellite licensing fees are imposed, satellite operators will be compelled to make an economic decision for each and every country: Does the value of serving the country warrant the cost of obtaining the necessary authorizations? The answer to this question will, for some countries, be no. For those countries, satellite operators will simply choose not to provide service. Of course, the availability of satellite-delivered services is critical to the modernization of existing communications infrastructures, including those used for local telephone service, advanced mobile communications, and the delivery of video programming. Thus, the use of competitive bidding procedures to award satellite licenses would contribute to further market stratification and help to widen the gulf between developed and underdeveloped countries. This would seriously undermine the Administration's goal of promoting the development of the GII and impede efforts to provide truly universal service

The use of competitive bidding procedures to award GSO/FSS licenses here in the United States may have other unanticipated anticompetitive effects. For instance, licensing authorities in countries in which there is high demand for satellite-delivered services are likely to use auctions to extract "greenmail" from satellite operators.¹⁷ Likewise, foreign auctioning and fee procedures might be used to discriminate against U.S. companies or to exclude them altogether from foreign

¹⁶ Letter from the Hon. James H. Quello, Commissioner, FCC, to the Hon. Slade Gorton, U.S. Senate (June 23, 1993) (reproduced in full at 139 Cong. Rec. S 7913, 7950 (June 24, 1993)).

¹⁷ Cf. Columbia Communications Corp., Petition for Declaratory Ruling with Respect to Coordination and Interconnection with the Proposed Tongasat Satellite System (filed Aug. 20, 1993) (alleging that the Kingdom of Tonga is claiming orbital locations in excess of its needs in order to sell them for pecuniary gain).

markets.¹⁸ There is no reason to assume that foreign licensing procedures will be as fair and transparent as those used by the FCC. More insidiously, perhaps, widespread licensing auctions may become a vehicle for anticompetitive conduct by well financed operators, which could artificially inflate the cost of entering various markets and thereby exclude would-be competitors.

PanAmSat recognizes that, in the Big-LEO proceeding, the Commission stated that it would not consider the possible impact on foreign governments of its decision to auction satellite licenses.¹⁹ The basis for that conclusion, apparently, was its conviction that the predicted overseas effect of a decision to auction satellite licenses was speculative. Fortunately, mutual exclusivity was avoided in that case and the Commission's rationale was not tested.

PanAmSat now urges the Commission to reconsider its position regarding satellite license auctions. As two FCC Commissioners have recognized, all current indications are that foreign countries are watching U.S. auctions closely and that there is a very serious probability that they will respond with their own auctions if the U.S. begins to auction satellite licenses.²⁰ The potential effect of such widespread auctioning would be devastating. Moreover, short of an international agreement, which is unlikely and which would pose other potential threats to competition, there would be no way to stop the chain reaction once begun — it would not be in the self interest of any single foreign government to be the one

¹⁸ See Letter from the Hon. James H. Quello, supra n.16 ("I am particularly concerned that some foreign governments ... could use our competitive bidding requirement as a justification for retaliatory measures."); FCC Chairman Acknowledges International Auction Threat, supra, n.14 (Chairman Hundt noting that "insofar as the satellite service in question is international, we are very concerned that you could not run a fair auction. An unfair auction is a bad idea.").

¹⁹ See 9 FCC Rcd at 5970-71.

²⁰ See Statement of the Hon. Rachele B. Chong, supra n.13; FCC Chairman Acknowledges International Auction Threat, supra, n.14.

country not receiving hard currency from satellite operators in exchange for the privilege to serve the jurisdiction. In short, the United States would set an extremely dangerous precedent if it were to require satellite operators to buy service rights at auction. If other countries were to follow the U.S. lead, the consequences could be catastrophic, both for the satellite industry and the developing the GII.

II. CONCLUSION

For the reasons set forth above, PanAmSat urges the Commission to allocate the entire Ka-band for satellite services and strongly urges the Commission not to license satellite systems in the Ka-band using competitive bidding procedures.

Respectfully submitted,

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September 7, 1995

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Comments of PanAmSat Corporation was sent by first-class mail, postage prepaid, this 7th day of September, 1995, to each of the following:

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